MOTION FILED SEP 2 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178.

TUSKEGEE INSTITUTE,

Petitioner.

v.

THE BANK OF NEW YORK, as Trustee of the Trust Established by ARTHUR B. EMMONS, by Indenture
THE BANK OF NEW YORK, as Trustee of the Trust Established by ARTHUR B. EMMONS, by Indenture Dated May 8, 1916, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION.

BASIL O'CONNOR,
JOHN C. FARBER,
DAVID BRADY,
CLENDON H. LEE,
Counsel for Petitioners,
120 Broadway,
New York 5, N. Y.

O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.
Of Counsel.

TABLE OF CONTENTS.

	PAGE
Motion	1
The Grounds for this Motion	2

Table of Cases.

Brinkerhoff-Faris Co. v. *Hill*, 281 N. Y. 673	3, 6
Carroll, Matter of Joseph M., 305 N. Y. 692	5
City of New Rochelle v. *Closter*, 296 N. Y. 506	5
Dodge v. *Cornelius*, 168 N. Y. 242	5
Hutchison v. *Ross*, 262 N. Y. 381	5
M'Culloch v. *State of Maryland*, 4 Wheat. 316	4
Missouri, ex rel. Missouri Insurance Co. v. *Gehner* 281 U. S. 313	2, 6
Nathan v. *Equitable Trust Co.*, 250 N. Y. 250	5
Nod-Away Co. v. *Carroll*, 240 N. Y. 252	5
Osborne, Matter of, 209 N. Y. 450	5
Persky v. *Bank of Amer. Nat'l. Ass'n.*, 261 N. Y. 212	6
Saunders v. *Shaw*, 244 U. S. 317	2, 6

Authorities.

Cohen and Karger, Powers of the New York Court of Appeals (Rev. Ed., 1952)	5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178.

TUSKEGI INSTITUTE,

Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B. EMMONS, by Indenture dated May 8, 1916, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION.

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner TUSKEGEE INSTITUTE moves this Court for permission to file nine (9) copies of its brief and reply brief submitted to the New York Court of Appeals for the sole and limited purposes of showing:

(1) The Court of Appeals was specifically informed of its own jurisdiction over, and responsibility to decide, federal constitutional questions.

(2) The federal constitutional questions were inescapably before the New York Court of Appeals.

(?) The federal constitutional questions here are identical to those before the Court of Appeals. Much of the petition for certiorari is comprised of substantially verbatim portions of such briefs.

This motion is compelled by the fact that the Brief in Opposition in behalf of respondents, Humphrey, et al, gravely misapprehends New York jurisdiction and the jurisdiction of this Court. While appearing to concede that constitutional issues were "set up", such respondents deny that the issues were "claimed".

The Grounds for this Motion are as Follows:

1. Petitioner's briefs show that the Court of Appeals was specifically informed of its own jurisdiction over and responsibility to consider constitutional questions. It was also informed of the jurisdiction of this Court over federal constitutional issues. Petitioner cited *Saunders* v. *Shaw*, 244 U. S. 317, and *Missouri, ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313, to the Court of Appeals on this point in its main brief filed in the Court of Appeals on November 25, 1960. Argument in the Court of Appeals was held on February 7, 1961, and its decision was rendered March 30, 1961. The constitutional issues, and the jurisdiction of this Court and of the Court of Appeals over such constitutional issues, were squarely before the Court of Appeals for a period of 126 days. This is certainly more ample notice to the state court than the one day notice described for a unanimous Court by Mr. Justice Holmes in the *Saunders* case, *supra*, as follows:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the

day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Supt. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.

Judgment reversed."

In that case, the state court was not given even a last clear chance—it was given a Parthian volley. In the case at bar, the notice of four months prior to decision, set forth in petitioner's two briefs and replied to in five briefs of respondents, was more than adequate. Respondents seem to argue for the proposition that it is, under this Court's decisions in *Saunders, supra, Gehner, supra,* and *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, a prerequisite to this Court's jurisdiction for a litigant, first to entrap the highest court of a state on constitutional issues, and thereafter bring the points before such court on reargument. The Petition for Certiorari correctly states (p. 6) that the constitutional questions did not "steal upon an unsuspecting" Court "and

pass unobserved". *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 402.

2. A jurisdictional problem can be contrived only if there is confusion as to the nature of the petition for certiorari herein. Where it is contended that the decision of a court is itself unconstitutional, having no rational basis in the record, nothing prior to such decision is controlling for jurisdictional purposes. Here, on this stipulated record, it is contended that the Court of Appeals' decision is unconstitutional on its face. Such a decision cannot be anticipated, because the underlying assumption of the judicial process is that a decision will have a rational basis. A pleading is to be factual, not presumptuous.

3. In the two divisions of the court of first instance, petitioner Tuskegee Institute was bound to anticipate that binding decisions of the highest court of the state would be followed.

Petitioner was also bound to anticipate that the Court of Appeals would follow its own decisions. Petitioner strenously urged that it do so. But since the Court of Appeals was free to depart from its former decisions, petitioner explicitly pointed out that to do so on this record would violate federal constitutional rights. Petitioner did so in two briefs. By way of emphasis, our reply brief below (p. 10) stated "We press these points".

4. Where lack of reason in a Court's decision works deprivation of constitutional rights, that issue can be met only by forewarning on brief and oral argument. This is in contrast to an unconstitutional statute, which obviously must be pleaded at the outset. Petitioner here does not seek to show that a statute is unconstitutional. It is likewise in contrast to deprivation of constitutional rights upon trial, which must be shown in the trial record. In this case there

was no trial, but a stipulation of facts. Petitioner does not seek to show that anything in the stipulation of facts is unconstitutional. Petitioner seeks only to show that upon a specific stipulated record, the same record before all the courts below, the decision of the Court of Appeals is unconstitutional in lacking a rational basis.

Petitioner could not anticipate that either division of the court of first instance would fail to follow the substantive law and the conflict of laws rules of New York, so emphatically and broadly stated by the highest court of that state in *Matter of Osborne* 209 N. Y. 450 and *Hutchison* v. *Ross* 262 N. Y. 381. Therefore, petitioner should not have set out in a pleading so many potential evils as to describe the chamber of horrors in a Gothic Romance, requiring for their avoidance prayers for deliverance and relief so broad, detailed, and varied as to encompass the Litany. A litigant could no more draw such a pleading than Edmund Burke knew how to draw an indictment against a whole people.

5. All five cases cited by respondents (Brief in Opposition, pp. 8-9), where the Court of Appeals has declined to consider constitutional questions not raised below, involved *statutes*. *Matter of Joseph M. Carroll*, 305 N. Y. 692 (New York City Charter and administrative code); *City of New Rochelle* v. *Closter*, 296 N. Y. 506 (tax statute); *Nod-Away Company* v. *Carroll*, 240 N. Y. 252 (rent control statute); *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250 (tolling of limitations statute during enemy alienage); *Dodge* v. *Cornelius*, 168 N. Y. 242 (statutory penalty). The unconstitutionality of a statute must be pleaded.

6. The treatise relied upon by our adversaries, Cohen & Karger, *Powers of the New York Court of Appeals*, (1952) page 624, states that there is no constitutional or statutory provision limiting the jurisdiction of the Court

of Appeals with respect to questions not presented to the courts below. Such treatise proceeds to discuss (pp. 626-627) the leading case in New York *Persky* v. *Bank of America National Assn.*, 261 N. Y. 212, wherein the Court of Appeals stated:

> "Where the facts found or conclusively proven do not justify the conclusions of law upon which judgment rests, it is not too late to point out the error in an appellate court, even though the original error was due in whole or in part to lack of timely care or wisdom on the part of counsel" (261 N. Y. at 218).

Thereafter such treatise refers to the "dubious basis" (p. 643) of any limitation whatever on questions before the Court of Appeals. Obviously, the language in statutory opinions cannot be construed so broadly as to refer to unconstitutional decisions, which by their nature can be discussed only on brief. Otherwise, the holdings of this Court in the *Saunders, Gehner,* and *Brinkerhoff-Faris* cases, *supra,* would be rendered meaningless.

7. The New York Legislature has not permitted any extension to other areas of the holdings that the Court of Appeals will not consider the unconstitutionality of a statute which is not raised below. As long ago as 1939 the Civil Practice Act was amended to prevent miscarriages of justice by providing in Section 592 (5) (2) that if permission to appeal were denied, a litigant would have an additional 30 days to appeal as of right, (i.e. on a constitutional question). *Cohen* and *Karger, supra,* state:

> "In 1939, however, the Legislature provided a solution by granting the appellant in such a case an additional thirty days from the date of the dismissal of his motion for leave to appeal, within which to take his appeal as of right" (p. 352).

The Legislature, therefore, has deliberately conferred three distinct, seriatim methods of appeal, each with a later time limitation. The appellant from a final order has three strings to his bow. Diligent counsel may, as here in the case at bar, apply first to the Appellate Division for permission to appeal, and if refused then to the Court of Appeals, and finally appeal as of right. The learned authors of such treatise relied upon by our adversaries also stated that if review is obtained by permission,

> "The scope of review is the same as if the case were appealable as of right" (p. 353).

8. Obviously, from the nature of this case as a review of a judicial decision and not of a statute, and from the Civil Practice Act itself, it is plain that there can be no merit to respondents' position that although petitioner may have "set up" constitutional questions below, it failed to "claim" deprivation of constitutional rights simply because the appeal was by permission. The Legislature itself has done away with what may formerly have been a perilous election of remedies upon an appeal.

For the foregoing reasons, it is respectfully submitted that the motion should be granted for the limited purposes set forth.

Respectfully submitted,

Basil O'Connor,
John C. Farber,
David Brady,
Clendon H. Lee,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

O'Connor & Farber,
120 Broadway
New York 5, N. Y.
Of Counsel.